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Supreme Court, U.S.
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No. 98-149

In The

Supreme Court of the United States

October Term 1998

COLLEGE SAVINGS BANK,
Petitioner,

vs.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the United States Congress have the power under Section 5 of the Fourteenth Amendment to enact that portion of the Trademark Remedy Clarification Act of 1992, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (the "TRCA"), which abrogated the states' Eleventh Amendment immunity for unfair competition suits alleging that a state engaged in false and misleading advertising of its product in violation of Section 43(a) of the Lanham Act ?

2. Did Florida Prepaid Postsecondary Education Expense Board waive its Eleventh Amendment immunity under the constructive consent doctrine set forth by this Court in *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964), by continuing to engage in the interstate marketing of its products after Congress' enactment of the TRCA by which Congress made it unmistakably clear that the states would be subject to suit in federal court for cases arising from violations of Section 43(a) of the Lanham Act?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States of America was a party before the Court of Appeals.

Petitioner College Savings Bank has no parent company. It has one wholly-owned subsidiary, College Savings Trust, Helena, Montana.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 131 F.3d 353 (3rd Cir. 1997), *cert. granted,* 67 U.S.L.W. 3433 (1999), Pet. App. A. The opinion of the United States District Court for the District of New Jersey is reported at *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 948 F. Supp. 400 (D.N.J. 1996), (1999), Pet. App. B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on December 5, 1997. The Court of Appeals denied a timely petition for rehearing on February 17, 1998. Pet. App. C. College Savings Bank's application for an extension of time to file a Petition for a Writ of Certiorari was granted by Justice Souter on April 21, 1998, extending the time to and including July 17, 1998. The Petition for Writ of Certiorari was filed on July 17, 1998. This Court granted the petition by order dated January 8, 1999.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case are set out at pages 2-5 of College Savings Bank's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. THE LANHAM ACT

This case involves College Savings Bank's ("CSB") contention that the Florida Prepaid Postsecondary Expense Board ("Florida Prepaid"), has engaged in false advertising in violation of Section 43(a) of the Lanham Act. Section 43(a) provides in part that persons subject to the Act shall be liable for damages caused by a competitor's misrepresentation of "the nature, characteristics, [or] qualities" of that person's goods or services. 15 U.S.C. § 1125(a)(1). The pertinent portions of Section 43(a) are:

> (1) Any person who...uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which—
>
> * * *
>
> **(B)** in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, . . . of his . . . goods, services or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The congressional purpose in enacting Section 43(a) is explained in Section 45. 15 U.S.C. § 1127. As here pertinent the section states:

> The intent of this chapter is to regulate commerce within the control of Congress... to protect persons engaged in such commerce against unfair competition . . . .

15 U.S.C. §1127.

In enacting the Lanham Act, Congress recognized that "[t]here is no essential difference between trade-mark infringement and what is loosely called unfair competition. Unfair competition is the genus of which trade-mark infringement is one of the species . . .. All trade-mark cases and cases of unfair competition involve the same legal wrong." S. Rep. No. 1333, 79th Cong. 2d Sess. (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275.

B. THE TRADEMARK REMEDY CLARIFICATION ACT

In 1992, Congress adopted the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) ("TRCA"). The congressional purpose was to ensure that the states would be held liable for violations of the Act in the same manner as any other entity. Accordingly, the amendments included a specific abrogation of the Eleventh Amendment immunity of the states:

> Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, . . . for any violation under this chapter.

15 U.S.C. § 1122(a).

As a part of the TRCA, Congress adopted other conforming amendments to the Lanham Act to ensure that the states would thereafter be held responsible for violations of the Act. Those included amending Section 43(a), 15 U.S.C. § 1125(a), to expand the definition of "person" to include the states:

> As used in this subsection the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

15 U.S.C. § 1125(a)(2).

Section 1127 of Title 15, which sets forth the construction, definitions and intent of the chapter also was amended to provide that the term "person" includes any state or instrumentality of a state. 15 U.S.C. § 1127.

The legislative history of the TRCA reinforces the fact that the sole purpose of the Act was to demonstrate Congress' intent that "States and State entities" would not be immune from suits under the Lanham Act. S. Rep. 102-280, 102d Cong., 1st Sess. at 2 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3087. Congress enacted the TRCA to satisfy this Court's requirement that the congressional intent to permit the states to be brought into federal court be made explicit in the language of the statute itself. *See* S. Rep. 102-280, *Id.* at 4-6, discussing the relationship of the TRCA to *Atascadero State Hosp. v. Scanlin,* 473 U.S. 334 (1985) (pertaining to the requirements

that must be met by Congress in exercising its powers under Section 5 of the Fourteenth Amendment), and *Welch v. Texas Dep't of Highways & Pub. Transp.,* 483 U.S. 468 (1987) (pertaining to the requirements that must be met by Congress to apply *Parden v. Terminal Ry. of Ala. Docks Dep't,* 377 U.S. 184 (1964)).

The Senate Report states that the statutory language was deliberately adopted to provide "the necessary clarity to ensure that Congress intended to override the Eleventh Amendment as an appropriate way to enforce the provisions of the Fourteenth Amendment." S. Rep. 102-280, *Id.* at 4, 5 (footnote omitted). The Report also states that the provisions of the TRCA are "justified under . . . the Fourteenth Amendment." *Id.* at 8. The report concludes: "Based on previous court decisions, S. 758 [TRCA] and S. 759 will constitutionally abrogate State Sovereign Immunity, providing a uniform system of protection." *Id.* at 11.

C. THE CONSTITUTIONAL ISSUES

Article I, Section 8, Clause 3 of the Constitution provides in relevant part that the Congress shall have power:

> To regulate Commerce with foreign Nations, and among the several States . . .

The Fourteenth Amendment provides in relevant part that no State shall:

> Section 1 [D]eprive any person of life, liberty or property, without due process of law . . . .

* * *

Section 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any Foreign State.

There are two constitutional issues involved in this case. First, petitioner CSB maintains that the Court of Appeals erred by concluding that Congress lacked the power under Section 5 of the Fourteenth Amendment to enact the TRCA making the states subject to suit for false advertising under Section 43(a) of the Lanham Act.

Second, the Court of Appeals erred in concluding that the activities of Florida Prepaid are beyond the reach of the *Parden* doctrine. CSB maintains the Court of Appeals applied the wrong test. The Court of Appeals has confused the difference between education, as an important state function, and the entry by the states into the commercial financial arena by offering investment vehicles to assist private citizens in meeting the costs of a college education. Under the broad doctrine enunciated by the Court of Appeals, virtually any activity that could be undertaken by a state would be beyond the reach of the *Parden* doctrine.

D. THE PARTIES

CSB is a New Jersey chartered, FDIC-insured bank that has been engaged since 1987 in selling "CollegeSure® CDs," a deposit contract administered in accordance with a patented

methodology that provides funds sufficient to meet future and unknown college expenses. Respondent Florida Prepaid is a "body corporate" of the State of Florida, which engages in the interstate marketing of a similar investment product in competition with CSB, *i.e.*, a program to meet future costs of a college education. Fla. Stat. Section 240.551(5), J.A. at 8. The Florida Prepaid program, which has been offered since 1988, is advertised and promoted nationally by brochures, press releases and other means.

E. THE PROCEEDINGS BELOW

CSB brought an action against Florida Prepaid on November 7, 1994, Civ. No. 94-5610 (GEB), in the United States District Court for the District of New Jersey ("the patent case"), contending that Florida Prepaid had infringed CSB's patent. CSB filed a second complaint, the one giving rise to this petition, against Florida Prepaid on August 25, 1995, alleging that Florida Prepaid's interstate marketing of its program was in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and the common law tort of unfair competition, Civ. No. 95-4516 (GEB) ("the Lanham Act Case"). CSB contends that Florida Prepaid falsely represented that the State of Florida guarantees that all beneficiaries will have an amount necessary to pay for the cost of a college education; that tax liability on the contract is deferred until the benefits of the contract, including proceeds for dormitory expenses, are disbursed upon enrollment in college; that Florida Prepaid's investment portfolio is backed by the "full faith and credit" of the United States; and that Florida Prepaid failed to disclose the existence of CSB's patent infringement case.[1]

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[1] Florida Prepaid answered CSB's Lanham Act complaint and filed a counterclaim on November 8, 1995, that challenged the reach of the First Amendment by contending that certain statements made by Mr.

Subsequent to this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), Florida Prepaid filed motions to dismiss both the Patent Act and Lanham Act cases contending that the decision deprived the court of jurisdiction under the Eleventh Amendment. Florida Prepaid's motion to dismiss CSB's Lanham Act case was granted and the case dismissed by the district court's order of December 13, 1996. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 948 F. Supp. 400 (D.N.J. 1996).[2]

Peter Roberts, President of CSB, represented actionable defamation, product disparagement, and trade libel. CSB filed a motion to dismiss the counterclaim, contending that a governmental entity cannot maintain libel or defamation actions because they are inconsistent with the free speech guarantees of the First Amendment. That motion was granted by the District Court on March 22, 1996. The dismissal was not appealed and the district court decision on that motion is not involved in this petition. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 919 F. Supp. 756 (D.N.J. 1996).

[2] The district court, in the same decision giving rise to this petition, denied Florida Prepaid's motion to dismiss the Patent Act case. That denial was based upon the district court's finding that Section 5 of the Fourteenth Amendment empowered the Congress to enact the Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230, which amended the Patent Act to permit states to be brought into federal court to defend against patent infringement claims. 35 U.S.C. §§ 271(h), 296. This was based upon the district court's finding that a patent is a property interest that Congress can protect by exercising its abrogation power under Section 5 of the Fourteenth Amendment. The holding was appealed by Florida Prepaid to the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the district court in a decision issued on June 30, 1998. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (1999). This Court granted Florida Prepaid's petition for a writ of certiorari on January 8, 1999, Docket No. 98-531.

A timely appeal was filed with the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the district court's judgment. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 131 F.3d 353 (3rd Cir. 1997), *cert. granted*, 67 U.S.L.W. 3433 (1999).

SUMMARY OF ARGUMENT

Article I, Section 8 of the Constitution provides Congress with a wide array of powers including the power to "regulate commerce . . . among the several states . . . ." In *Seminole Tribe*, this Court held that Article I does not provide Congress with the power to abrogate the immunity of the states provided for by the Eleventh Amendment. This holding was principally based upon the fact that the Eleventh Amendment was adopted subsequent to Article I and therefore served to limit the power of Congress under Article I.

In *Seminole Tribe*, this Court also recognized that Congress does have power under Section 5 of the Fourteenth Amendment to enforce its provisions by appropriate legislation, including the right to abrogate the Eleventh Amendment immunity of the states.

Pursuant to its Article I powers, Congress enacted the Lanham Act providing an amalgam of protections for businesses, including the right to seek damages resulting from a competitor's false advertising of its products and services. In 1992, Congress enacted the TRCA, which by its explicit terms serves to abrogate the Eleventh Amendment immunity of the states and to treat the states as "persons" in the same manner as all other entities made subject to the Lanham Act. The legislative history of the TRCA makes it clear that the statutory provisions were designed specifically to comply with this Court's requirement that abrogation of the Eleventh Amendment immunity must be unmistakably clear in the language of the statute itself. Congress also made it clear that

the language of the TRCA was designed to meet this Court's requirement of explicit language for the *Parden* doctrine to apply.

CSB maintains in answer to the first Constitutional issue raised by this petition that the TRCA's abrogation of the states' immunity under the Eleventh Amendment, as it applies to the false advertising of a competitor's own products and services, is a constitutional exercise of Congress' Section 5 Fourteenth Amendment power. The position of Florida Prepaid is that, under *Seminole Tribe*, no property or liberty rights created by Congress pursuant to Article I of the Constitution can be made subject to Congress' Section 5 Fourteenth Amendment enforcement powers; and therefore, the TRCA is unconstitutional. That, CSB maintains, represents a fundamental misreading of this Court's decision in *Seminole Tribe*. *Seminole Tribe* did not involve any liberty or property rights. Therefore, it offers no authority for the proposition that Congress' Section 5 powers cannot be used to enforce against the states the guarantees of Section 1 of the Fourteenth Amendment with respect to any and all property rights, including those which Congress has created under its Article I powers.

The district court in this case implicitly recognized that property rights created by Congress pursuant to Article I are subject to Congress' Section 5 Fourteenth Amendment power by upholding the constitutional validity of Congress' 1992 legislation abrogating the immunity of the states for the purpose of enforcing patents.[3]

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[3] Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992). *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 948 F. Supp. 400 (D.N.J. 1996).

Both the district court and the Court of Appeals expressed the fear that a finding that the TRCA is constitutional with respect to the issues in this case would serve to undermine this Court's holding in *Seminole Tribe*. They did so with no explicit discussion of the relationship between Congress' Article I and Section 5, Fourteenth Amendment powers.

Both the district court and the Court of Appeals failed to recognize that "property" is not created by the Constitution. Rather, property has been created by the common law and the legislative enactments of the states and the federal government. Surely, Congress, under Article I, is as free to create property rights as are the states. There is nothing in *Seminole Tribe* that suggests that Congress' abrogation power under the Fourteenth Amendment cannot reach the deprivation of liberty or property rights by the states without due process of law, without regard to the origin of those rights.

The Court of Appeals also dismissed the significance of this Court's holding that a "business" is property for the purpose of the protections afforded by the Fourteenth Amendment. Since the protections of the Lanham Act are available only to business competitors and because in any event the tort of unfair competition is a tort designed to protect property interests, the Court of Appeals erred by finding that CSB's Lanham Act claim did not involve a property interest within the protections of the Fourteenth Amendment.

The second constitutional issue concerns the *Parden* doctrine. CSB maintains that Florida Prepaid waived its Eleventh Amendment immunity by engaging in a commercial enterprise subsequent to the time that Congress made clear that to do so would be deemed a waiver of immunity under the *Parden* doctrine. The Court of Appeals declined to affirm the district court's holding that *Parden* had been overruled by implication by this Court's decision in *Seminole Tribe*. In

doing so, however, the Court of Appeals adopted a definition of core governmental function that is so broad that, as a practical matter, *Parden* is deprived of any meaning.

The Court of Appeals correctly found that education is a core state governmental function. The Court of Appeals, however, erred in finding that providing investment services to meet the costs of college is a governmental function beyond the reach of *Parden*. Florida Prepaid, a business enterprise, has entered into the commercial arena in competition with CSB and other private sector businesses by offering a means of saving to meet the future costs of a college education. This is an area that traditionally has been left to the private sector. In any event, such activity clearly is not within the exclusive sphere of the states.

In *Seminole Tribe*, this Court characterized the *Parden* waiver doctrine as "unremarkable, and completely unrelated" to the issue of the abrogation of the Eleventh Amendment immunity of the states by the exercise of Congress' Section 5 Fourteenth Amendment powers. *Seminole Tribe*, 517 U.S. at 65. The continued validity of *Parden* does not threaten the valid application of the Eleventh Amendment since the states will be deemed to have waived their immunity only when they leave core governmental functions and enter into the commercial marketplace, as Florida Prepaid has done here.

In sum, the Court of Appeals erred both in finding that the TRCA was not a valid exercise of Congress' Section 5 Fourteenth Amendment power, and also erred in finding that the *Parden* doctrine does not apply to the facts of this case.

CSB believes that this Court's review of this case should be guided by the words of Chief Justice Marshall writing for the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

ARGUMENT

I. THE LIBERTY AND PROPERTY RIGHTS PROTECTED BY THE FALSE ADVERTISING PROVISIONS OF SECTION 43(A) OF THE LANHAM ACT ARE WITHIN THE PROTECTION OF THE FOURTEENTH AMENDMENT.

By enacting the TRCA, Congress abrogated the Eleventh Amendment immunity of the states in order to permit federal court jurisdiction over actions under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The Court of Appeals found that the "TRCA surely manifests" the congressional intent to abrogate the Eleventh Amendment immunity of the states. *College Savings Bank*, 131 F.3d at 357, Pet. App. at 7a. The Court of Appeals also found, however, that the false advertising provisions of Section 43(a), as applied to a competitor's misrepresentation of its own product, do not protect property interests within the meaning of the Fourteenth

Amendment, and are, therefore, beyond Congress' Section 5 powers. That finding, however, is contrary to this Court's construction of the scope of the liberty and property interests protected by the Fourteenth Amendment.

A. THIS COURT HAS RECOGNIZED THAT CONGRESS' SECTION 5, FOURTEENTH AMENDMENT POWER CAN BE USED TO ABROGATE THE ELEVENTH AMENDMENT.

1. The Constitutional Standard

This Court, in *Seminole Tribe,* recognized that Congress has the authority under Section 5 of the Fourteenth Amendment to enact legislation to enforce the provisions of Section 1 of the Amendment, including abrogating the Eleventh Amendment immunity of the states:

> In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the

> immunity from suit guaranteed by that Amendment.

Seminole Tribe, 517 U.S. at 59 (citations omitted). *See also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997).

2. Section 43(a) Of The Lanham Act Protects A Business' Property Rights.

Section 43(a) of the Lanham Act represents a federal codification of the tort of unfair competition, a tort that by definition serves to protect property rights. The Act in pertinent part states that the intent is "to protect persons engaged in . . . commerce against unfair competition . . . ." 15 U.S.C. § 1127. It has long been recognized that the tort of unfair competition protects property rights. As noted in PROSSER AND KEETON ON TORTS: "unfair competition torts appear to involve less a question of tortious activity than a question of *property* to be protected." W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 130, at 1015 (5th Ed. 1984) (emphasis added).

Further, Section 43(a) of the Lanham Act is simply a federal codification of the common law tort of unfair competition. *See SK&F Co. v. Primo Pharmaceutical Laboratories*, 625 F.2d 1055, 1066 (3d Cir. 1980)("[E]xcept for the interstate commerce requirement, the elements of the unfair competition torts described by New Jersey law and by Section 43(a) of the Lanham Act are the same."). Section 43(a) represents a federal codification of the common law tort of unfair competition. In *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3rd Cir. 1954), the Third Circuit acknowledged the scope of the rights protected by the false advertising portion of Section 43(a) of the Lanham Act:

> But however similar to or different from pre-existing law, here is a provision of a federal

> statue which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts.

See also AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1428 (3d Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995). Thus, the Fourteenth Amendment, by affording protection to "property," by its terms extends to the tort of unfair competition.

Treating the rights against unfair competition codified by Section 43(a) of the Lanham Act as property rights protectable by the Fourteenth Amendment and within Congress' power under Section 5 of that Amendment is consistent with this Court's precedent. *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918)("[T]he *right to acquire property* by honest labor or the conduct of a lawful business is as much entitled to protection as the *right to guard property already acquired. It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.")* (emphasis added) (citations omitted).

The Court of Appeals dismissed the significance of *International News Service* in a footnote. *College Savings Bank*, 131 F.3d at 360-61, n.4, Pet. App. at 15a n.4. ("Thus, while the opinion does discuss property rights and the tort of unfair competition, the Court did not determine whether the tortious actions injured a property right worthy of protection under the Fourteenth Amendment. The Court merely determined that an injury to a specific right had occurred.").

The reasoning by this Court in *International News Service* was in the context of jurisdiction to hear the case in equity. Although not called upon directly to decide whether the tort of unfair competition represents a "property" right, this Court appears to take as a given that "the ordinary case of

unfair competition" represents a means of protecting property rights. That the conclusion was in the context of jurisdictional findings adds strength to the application of the conclusion to this case. There is no basis for concluding that property is property for the purpose of equitable jurisdiction, but is not property for the purposes of enforcement under the Fourteenth Amendment.[4]

3. The Protections Of The Lanham Act Are Available Only To Business Competitors.

Section 43(a) protection is available only to a competing business. Thus, College Savings Bank has standing to bring this Lanham Act case only because it has suffered damage to its business property interests. Section 43(a), 15 U.S.C. § 1125(a), confers standing on "any person who believes that he is or is likely to be damaged" as a result of a defendant's activities. This phrase has been interpreted as intended "exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct," and thus consumers have no standing to sue. *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 692 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). *See also Serbin v. Ziebart International Corp.*, 11 F.3d 1163, 1179 (3d Cir., 1993), *reh'g en banc denied, sub nom Guarino v. Sun Co.*, 1993 U.S. App. LEXIS 34410 (3d Cir. 1993)("[W]e join the Second Circuit in holding that Congress, when authorizing federal courts to deal with claims of false advertising, did not contemplate that federal courts should entertain claims brought by consumers.");

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[4] More recently, this Court broadly defined property rights to include even the right to publicity. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The Court in that case recognized the broad scope of "property" rights and also noted that protecting the right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the patent and copyright laws long enforced by this Court." *Id.* at 576.

Barrus v. Sylvania, 55 F.3d 468, 470 (9th Cir. 1995)("As consumers, [plaintiffs] have alleged neither commercial injury nor competitive injury. Therefore . . . they lack standing."); and *Stanfield v. Osborne Industrials*, 52 F.3d 867, 873 (10th Cir.), *cert. denied*, 516 U.S. 920 (1995)("Thus, to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.").

4. Businesses Are Property Within The Meaning Of The Fourteenth Amendment And Have Liberty And Property Interests Protected By That Amendment.

a. This Court's Precedent.

A long line of decisions of this Court have found that a business is a property or liberty interest. It follows inexorably that the Fourteenth Amendment protects against any activities by the states that impair or destroy a business' property. Similarly, the Congressional power under the Fourteenth Amendment "to enforce by appropriate legislation the provisions" of the Fourteenth Amendment includes the power to legislate protection against actions by an arm of the state that may impair or destroy a business' property, by engaging in unfair and misleading marketing practices proscribed by Section 43(a) of the Lanham Act, for example.

This Court has recognized that the rights protected by the Fourteenth Amendment are inextricably intertwined and that it is immaterial whether an interest is characterized as a property interest or a liberty interest. *Smith v. Texas*, 233 U.S. 630, 636 (1914)("Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three."). It is well established that a "business" is a property right entitled to protection under the Fourteenth

Amendment. *Duplex Co. v. Deering*, 254 U.S. 443, 465 (1920). (A "business . . . is a property right, entitled to protection against unlawful injury or interference . . . .").

Additionally, this Court repeatedly has held that the enforcement power of Congress under Section 5 of the Fourteenth Amendment reaches "practices that in and of themselves do not violate" the Amendment. *City of Rome v. United States*, 446 U.S. 156, 177 (1980), relying, *inter alia*, upon *Ex Parte Virginia*, 100 U.S. 339 (1879); and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). This Court's decision in *City of Boerne* again reconfirmed Congress' Section 5 power to enforce the Fourteenth Amendment through legislation, regardless of whether there has been a constitutional tort. *City of Boerne*, 117 S. Ct. at 2163.

The Court of Appeals recognized the breadth of the interests found by this Court to be within the scope of property and liberty rights protected by the Fourteenth Amendment. *College Savings Bank*, 131 F.3d at 360, Pet. App. at 14a, citing *Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478, 485 (1988) (recognizing an unsecured claim against the state); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)("[T]he types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact'") (citations omitted); and *Paul v. Davis*, 424 U.S. 693, 710 (1976)("[T]here exists a variety of interests which are difficult of definition, but are nevertheless comprehended within the meaning of 'liberty' or 'property' as meant in the Due Process Clause.").

A number of other cases support the position that a business is a property right protected by the Fourteenth Amendment. *Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928)("That appellant's business is a property right . . . and as such entitled to protection against state legislation in contravention of the federal Constitution is, of course, clear.").

(citations omitted), *overruled on other grounds, North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156 (1973)[5]; *Pierce v. Society of Sisters,* 268 U.S. 510, 536 (1925) (Holding that a state law that would have required that children be sent only to state schools represented "an arbitrary, unreasonable and unlawful interference with [plaintiffs'] patrons and the consequent destruction of their business and property."); *Truax v. Corrigan,* 257 U.S. 312, 327 (1921)("Plaintiff's business is a property right (*Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 465) and free access for employees, owner and customers to his place of business is incident to such right."); *United States v. Tropiano,* 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied,* 397 U.S. 102 (1970)("The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments to the Constitution . . . .") (citations omitted).

Despite its discussion of the broad protection afforded to businesses under the Fourteenth Amendment, the Court of Appeals has failed to follow the precedents of this Court defining the scope of that protection. In contrast, the Federal Circuit found that Florida Prepaid had cited "no authority forbidding Congress from enacting statutes that abrogate state immunity in order to protect persons from property deprivations without due process of law." *College Savings Bank,* 148 F.3d at 1349, Pet. App. at 105a. That conclusion applies equally to the proceedings in the Third Circuit in the instant case. As the Federal Circuit concluded:

> Surely the enforcement power of Congress under Section 5 must embrace the full range

[5] Both *Liggett Co.* and *North Dakota Pharmacy Bd.* recognized that the failure of a state to grant a license to a business would represent a violation of Section 1 of the Fourteenth Amendment, unless found to be a reasonable exercise of police power.

> of behavior that the Supreme Court has held to violate the substantive provisions in section 1 of the Amendment. (Citing *City of Boerne,* 117 S. Ct. at 2163).

Id.

b. All Forms Of Property Are Protected By The Fourteenth Amendment.

Obviously, all forms of tangible property, *e.g.,* an automobile or real estate, more readily fit into the commonplace concept of "property." Even many intangible property rights, such as trademarks, are more readily conceptualized as "property" than is the property right of a business to be protected from unfair competition.

This Court has recognized, however, that there is no essential distinction between trademark infringement and the law of unfair competition. Indeed, the business element is essential; a trademark is not property except in connection with an existing business. As stated by this Court:

> This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition.

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916).

This Court concluded:

> In short, the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business. (citations omitted.)

Id. at 414. *See also United Drug Co. v. Rectanus Co.*, 248 U.S. 90, 97 (1918)("The law of trade-marks is but a part of the broader law of unfair competition . . . ."); and S. Rep. No. 1333, *reprinted in* 1946 U.S.C.C.A.N. at 1275.

The harm to be prevented by protecting any kind of property rights, however characterized, is not distinguishable. Ultimately, the purpose of protecting all property rights, and in particular those created and defined by Section 43(a) of the Lanham Act, is to ensure that a business is not deprived of the monetary advantages of that property without due process of law. CSB is deprived of the revenue and earnings to which it is entitled when a competitor falsely describes its own product, thereby depriving CSB of customers and income because of the false descriptions. That deprivation of property, *i.e.*, the earnings and revenues which it would otherwise enjoy but for the false description of the competitor's products or services, is protected by the Fourteenth Amendment.

Under Article I, Congress has the power to create and codify particular types of property rights. Section 43(a) of the Lanham Act was enacted pursuant to that power. Congress also has the power to protect those property rights against the states by exercising its Section 5 Fourteenth Amendment powers. The extraordinary position that is necessarily taken by Florida Prepaid in this case is that Congress, presumably alone among sources of law, has no power to create property rights entitled to the protection of the Fourteenth Amendment. That

is a radical, wholly unprecedented position which finds no support by the holding of this Court in *Seminole Tribe*.

B. THIS COURT'S DECISION IN *CITY OF BOERNE* SUPPORTS THE CONSTITUTIONALITY OF THE TRCA.

This appeal arose because of the Court of Appeals' ruling that this Court's decision in *Seminole Tribe* necessarily served to invalidate Congress' 1992 adoption of the TRCA, which abrogated the Eleventh Amendment immunity of the states for the purpose of enforcing the Lanham Act. *Seminole Tribe*, however, addressed solely the power of Congress to abrogate the Eleventh Amendment pursuant to its Article I powers. The case did not involve any liberty or property interests. *Seminole Tribe of Florida v. State of Fla.*, 11 F.3d 1016, 1025 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996)("Thus, IGRA creates no liberty or property interests and cannot implicate the Fourteenth Amendment.").

This Court explicitly recognized in *Seminole Tribe* that Congress has the power to abrogate the Eleventh Amendment under Section 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 59. Ultimately, therefore, *Seminole Tribe* is of only limited assistance in addressing this case, which involves the scope of the liberty and property interests protected by Section 1 of the Fourteenth Amendment. This Court's decision in *City of Boerne* is a more useful guide in addressing the constitutionality of the TRCA.

The essence of this Court's decision in *City of Boerne* is that there is no "constitutional right to ignore neutral laws of general applicability." *City of Boerne*, 117 S. Ct. at 2161, citing *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The enactment of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, was a direct and explicit attempt by Congress to

overturn this Court's holding in *Smith*. *City of Boerne*, 117 S. Ct. at 2161-62. This Court, however, already had found in *Smith* that a law of neutral application does not violate the prohibitions of Section 1 of the Fourteenth Amendment. Thus, RFRA was an attempt by Congress to interpret and define the substantive protections of the Fourteenth Amendment. Congress does not have "the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 117 S. Ct. at 2164.

This case presents quite different issues. Here, no substantive change in constitutional protections is involved. Congress, by enactment of the TRCA, simply placed the states on an equal footing with private parties by requiring the states to be subject to the same rule of law applicable to private parties, *i.e.*, to be responsible for damages caused by violations of the Lanham Act. The TRCA is designed to enforce the constitutional protections afforded against the states by Section 1 of the Fourteenth Amendment, *i.e.*, the disregard of the liberty and property rights protected by Section 43(a) of the Lanham Act. Unlike RFRA, the TRCA does not constitute "displacing laws and prohibiting official actions of almost every description . . . ." *City of Boerne*, 117 S. Ct. at 2170. Here there is a proportionality and congruence between the Congressional means adopted and the end to be achieved.

City of Boerne reaffirmed the broad scope of Congress' Fourteenth Amendment enforcement powers. *City of Boerne*, 117 S. Ct. at 2163 ("All must acknowledge that Section 5 is 'a positive grant of legislative power' to Congress") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).[6] This Court

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[6] The Court also noted that:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879).

recognized that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies . . . ." *City of Boerne* 117 S. Ct. at 2164. The Court also held that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." *City of Boerne*, 117 S. Ct. at 2171.

It is within Congress' Article I "sphere of power" to establish the liberty and property rights to which businesses shall be entitled. That is precisely what Congress did in enacting Section 43(a) of the Lanham Act. Since it is established that property rights are a product of laws, not the Constitution, the Congressional determination in the TRCA that the states should be held responsible for violations of those property rights is within Congress' Section 5 powers.

C. THE COURTS BELOW HAVE ADOPTED AN ERRONEOUS INTERPRETATION OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

1. Florida Prepaid's Position.

The specific issue presented by this case is whether false and deceptive advertising implicates a business property right protected by the Fourteenth Amendment. The more fundamental constitutional issue presented by this case, as it relates to the power of Congress under Section 5 of the

Fourteenth Amendment, is whether the Fourteenth Amendment applies to all liberty and property rights. Florida Prepaid maintains that property rights created by Congress pursuant to its Article I powers cannot be made subject to Congress' enforcement power under Section 5 of the Fourteenth Amendment. Florida Prepaid contends, therefore, that to permit Congress to exercise its Section 5 power with respect to the rights created by the Lanham Act would effectively nullify *Seminole Tribe's* overruling of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Florida Prepaid's premise is that because the Lanham Act is a creature of Congress' Article I commerce power, adoption of the TRCA cannot be a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

The Court of Appeals' adoption of Florida Prepaid's position fails to come to grips with the fundamental fact that "[p]roperty interests, of course, are not created by the Constitution." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* In sum, creating and defining property rights is a legislative, not a constitutional, exercise.

There can be no dispute that Congress is free under its Section 5 power to protect property interests as created by the states by statute or as defined by the common law. To do otherwise would deprive Section 5 of all meaning. Thus, Florida Prepaid's ultimate position can be only that Congress can enact remedial legislation under Section 5 to protect property rights, *except for property rights that the Congress itself has created.* Florida Prepaid's position is a wholly unprecedented and unsupported attempt to limit congressional power.

As made clear by this Court's decision in *City of Boerne v. Flores*, the Fourteenth Amendment is not, in itself, a

grant of power to Congress to create substantive rights. Rather, Congress, in exercising its Section 5 power, can only enforce against the states the procedural due process guaranteed by Section 1 of the Fourteenth Amendment. Surely, however, the fact that Congress does not have the power under the Fourteenth Amendment to create property rights cannot mean that Congress cannot create enforceable property rights under its Article I power. Congress' enforcement power under Section 5 of the Fourteenth Amendment necessarily includes the authority to protect all property rights, regardless of whether those rights are the product of state or federal law. Florida Prepaid's radical position to the contrary is flatly wrong[7].

2. The District Court Failed To Recognize That The Fourteenth Amendment Serves To Protect Property, Regardless Of The Source of That Property.

The district court found that the 1992 amendments to the Patent Act were a valid and constitutional exercise of Congress' Section 5 powers under the Fourteenth Amendment. Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230. The finding was premised upon the court's conclusion that a patent is "property" for the purposes of the Fourteenth Amendment. *College Savings Bank*, 948 F. Supp. at 422-26, Pet. App. at 79a-87a. The district court certainly was entirely correct in reciting and

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[7] Florida Prepaid's ultimate position is more radical. Florida Prepaid contends that the Fourteenth Amendment can be used only to remedy the "kind of 'insidious discrimination' against the newly freed slaves that prompted its adoption." *College Savings Bank*, 948 F. Supp. at 423-24, Pet. App. at 82a. That position has been rejected decisively by both the district court and the Federal Circuit. *See College Savings Bank*, 948 F. Supp. at 424, Pet. App. at 82a and *College Savings Bank*, 148 F.3d at 1349, Pet. App. at 104a.

noting that there is well established authority for the proposition that a patent is property. *Id.*

The district court also found, however, that the creation of a right to be "free from alleged false advertising simply does not qualify as a property right for the purposes of the Due Process Clause of the Fourteenth Amendment . . . ." *College Savings Bank*, 948 F. Supp. at 426, Pet. App. at 89a. The district found that Congress cannot "by simple fiat" declare that a particular cause of action represents property. *Id.*, 948 F. Supp. at 427, Pet. App. at 90a, 91a.

That formulation misstates the issue. Congress can create property under its Article I powers. In the case at bar it is clear that Congress, pursuant to the exercise of its Article I powers, enacted Section 43(a) of the Lanham Act. Section 43(a) creates a number of rights for businesses, including the right to bring an action against a competitor for unfair competition. Contrary to the contentions of Florida Prepaid, the Fourteenth Amendment protects *all* property, including property rights created by Congress under its Article I powers. Although CSB does not dispute that ultimately it is for the courts to determine whether a particular right created by the Congress pursuant to Article I represents a liberty or property right protected by the Fourteenth Amendment, it is equally clear that the courts should give deference to a congressional determination that a particular right that it has created pursuant to its Article I power is within the protection of the Fourteenth Amendment. *City of Boerne*, 117 S. Ct. at 2164, 2171-72.

3. The Court Of Appeals Failed To Recognize That Property Created By Congress Pursuant To Its Article I Powers Is Protected By The Fourteenth Amendment.

Similar to the district court, the Court of Appeals failed to recognize that property rights created by Congress under

Article I are protected by the Fourteenth Amendment. The Court of Appeals found correctly that this Court has established a two-part standard to determine Congress' power to abrogate the Eleventh Amendment immunity of the States. This Court has stated that in order to find a valid abrogation, two questions must be answered affirmatively: "First, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at 55 (citation omitted).

The Court of Appeals found that the language of the TRCA "manifests Congress' unambiguous intent to abrogate the states' immunity." *College Savings Bank*, 131 F.3d at 357, Pet. App. at 8a. That finding by the Court of Appeals is beyond argument. The pertinent portions of the TRCA provide that any state, or instrumentality of the state "shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . ." 15 U.S.C. § 1122. Therefore, Congress' action manifestly satisfies the first part of the test as set forth in *Seminole Tribe*.

The Court of Appeals also found that: "Clearly, a business is an established property right entitled to protection under the Fourteenth Amendment." *College Savings Bank*, 131 F.3d at 361, Pet. App. at 15a (citations omitted). Despite that holding, the Court of Appeals found erroneously that the TRCA failed to meet the second part of the test set forth in *Seminole Tribe* by concluding that destruction of the property interests of CSB by a competitor's unfair and deceptive advertising is beyond the reach of the Fourteenth Amendment. The Court of Appeals held, with respect to Section 43(a) of the Lanham Act, that "[t]he only cognizable property right that could be involved would be a right to be free of false advertising, a right that is not an intangible property right protected under the Fourteenth Amendment." *Id.*, 131 F.3d at

360, Pet. App. at 14a. The Court of Appeals also held that "just because the state's actions impact on a private business does not mean that this action somehow infringes on the Fourteenth Amendment rights of the private individual." *College Savings Bank,* 131 F.3d at 361, Pet. App. at 16a, 17a.

The essence of the property rights protected by Section 43(a), however, is a business' loss of revenue and earnings resulting from a competitor falsely advertising its product. The "state's action impact[ing] on" CSB is the loss of customers. By engaging in unfair competition, Florida Prepaid has made sales of its investment products that would otherwise have been made by CSB. CSB has lost the earnings that would have resulted from those sales. The loss of earnings impairs CSB's ability to form capital, the life blood of any business and the growth force of our economic system. Ultimately, it is this loss of money, which clearly is property, that Section 43(a) is designed to protect. If a business is not protected by the Fourteenth Amendment against the damages caused by false advertising, the Court of Appeals' finding that "a business is an established property right entitled to protection under the Fourteenth Amendment" is shorn of much of its meaning.

The Court of Appeals appears to premise its holding principally upon a fear that to recognize Congress' power in this case would give to the Congress "almost unrestricted power to subject states to suit through the exercise of its abrogation power." *College Savings Bank,* 131 F.3d at 361, Pet. App. at 17a. The Court of Appeals concluded that to recognize Congress' power in this instance would allow Congress to "pass any law that tangentially affected the ability of businesses to operate and then create causes of action against the states in federal court if they infringed on those federally created rights." *Id.*

The Third Circuit's concerns are misplaced, and its holding serves to deprecate Congress' Article I constitutional power to create property rights. Property has been created and defined by the common law, state legislatures and the federal government to include a wide array of rights. The breadth of those rights provides no basis for concluding that a particular right is not protected by the Fourteenth Amendment because of a desire to restrain Congress' abrogation of the states' Eleventh Amendment immunity. Most important, there can be no restrictions upon Congress' Section 5 power to enact remedial legislation abrogating the states' immunity merely because the property rights in issue were created and defined by Congress under its Article I power.

4. The Cases Relied Upon By The Court Of Appeals Do Not Support The Decision.

The Court of Appeals placed principal reliance for its holding upon *Gentry v. Howard*, 365 F. Supp. 567 (W.D. La. 1973). *College Savings Bank,* 131 F.3d at 361, Pet. App. at 16a. That case stands for the unremarkable proposition that the loss of revenue resulting from a competitive service operated by a governmental entity does not amount to a taking or deprivation of property within the meaning of the Fourteenth Amendment. As found in that case, mere competition is not in violation of the guarantees of the Fourteenth Amendment. Fourteenth Amendment guarantees, however, do extend to a state destroying a business' property by engaging in false and misleading advertising.

The Court of Appeals also relied upon *Hegeman Farms Corp. v. Baldwin,* 293 U.S. 163, 170 (1934)("The Fourteenth Amendment does not protect a business against the hazards of competition"). *College Savings Bank,* 131 F.3d. at 361, Pet. App. at 16a. *Hegeman Farms* and the holding relied upon by the Court of Appeals are inapplicable to this case. CSB recognizes that the states can enter the commercial sphere and

compete with other investment vehicles for college savings. CSB's complaint does not seek protection from the hazards of lawful competition from Florida Prepaid, but rather protection against unfair competition in the form of false and deceptive statements that deprive CSB of its revenues and earnings.

The Court of Appeals' reliance on *Paul v. Davis*, 424 U.S. 693 (1976), also is misplaced. *College Savings Bank*, 131 F.3d at 360, Pet. App. at 15a. In *Paul*, this Court rejected the proposition that a person's personal reputation alone, without monetary loss, represents an intangible property interest protected by the Fourteenth Amendment. The Court held that the prior Supreme Court cases do not establish that "reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul*, 424 U.S. at 701. This case involves the "tangible interest" of CSB to seek redress for the monetary loss caused by false advertising, a property and liberty interest that differs fundamentally from the personal reputation issue addressed in *Paul*.

Judge Wisdom, in his dissent in *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998), *reh'g en banc granted*, criticized a similar reliance by the majority upon *Paul*. As he explained:

> *Paul* involved an injury to reputation only. The present case involves much more than an interest in reputation. This case involves an interest created under the Lanham Act.

Chavez, 157 F.3d. at 296, n.41. Similarly, CSB's claim in this case has nothing to do with reputation, but instead seeks redress for the damages caused to its business resulting from Florida Prepaid's false advertising of its product in violation of a property interest created under the Lanham Act.

5. The Harm To Property Rights From All Forms Of False Advertising Is Identical.

The Court of Appeals also suggested that there could be a constitutional distinction within Section 43(a) of the Lanham Act depending upon whether the violation consists of misrepresentation about a competitor's goods or services, or misrepresentation of one's own goods and services, which is the claim raised by CSB's complaint. *College Savings Bank*, 131 F.3d at 361-62, Pet. App. at 17a. There is, however, no principled distinction between the two kinds of misrepresentations. The property and liberty interests harmed by misrepresentation of a competitor's own goods or services are exactly the same as the interests harmed by misrepresentation about another person's goods or services. CSB recognizes that the panel did not decide the issue. Nevertheless, raising the possibility of a different outcome demonstrates confusion about the issue of the property interests protected by the Fourteenth Amendment.

A business represents a property right, a proposition that is beyond dispute. It is therefore neither feasible nor constitutionally sound to divide that property right so that only some portions of the right are protected by the Fourteenth Amendment. Congress has the constitutional authority to protect property by prohibiting false advertising by a business addressed to either its own or a competitor's goods and services. Congress did so by enacting the Lanham Act. Congress made the states amenable to suit in federal court for violating the property rights protected by the Lanham Act by enacting the TRCA. The possible distinction in the constitutionality of that Act postulated by the Court of Appeals makes no sense and should be rejected. TRAC is constitutional as applied to all forms of advertising prohibited by the Lanham Act.

D. THE FEDERAL CIRCUIT'S DECISION CORRECTLY RECOGNIZES THE POWER OF CONGRESS TO ENFORCE PROPERTY RIGHTS CREATED UNDER ARTICLE I BY THE EXERCISE OF ITS SECTION 5, FOURTEENTH AMENDMENT POWER.

The Federal Circuit found that Congress' Fourteenth Amendment power includes the power to protect property rights created by Congress pursuant to its Article I power. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 148 F.3d. 1355 (Fed. Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (1999). Docket No. 98-531. The Federal Circuit rejected Florida Prepaid's contention that this Court's overruling of *Union Gas* in *Seminole Tribe* means that any property right created by Congress pursuant to any of its Article I powers is necessarily beyond the power of Congress under Section 5 of the Fourteenth Amendment. *College Savings Bank*, 148 F.3d at 1351, Pet. App. at 111a.

The Federal Circuit rejected the Fifth Circuit's conclusion in *Chavez* that any right created by Congress pursuant to Article I is beyond the reach of Congress' abrogation power under Section 5 of the Fourteenth Amendment. *Id.*, 148 F.3d at 1351, Pet. App. At 111a. The Fifth Circuit based its decision on a spurious fear of an "end-run" around *Seminole Tribe*. *Chavez v. Arte Publico Press*, 157 F.3d 282, 289 (5th Cir. 1998), *reh'g en banc granted*. ("Congress could easily legislate 'property' interests and then attempt to subject states to suit in federal court for the violation of such interests. This end-run is just as possible under a liberal interpretation of the Due Process Clause of the

Fourteenth Amendment as it was under the theories of Article I rejected by the Court in *Seminole*.").[8]

The Federal Circuit criticized and refused to follow the Fifth Circuit's analysis and the similar analysis by the Third Circuit in the case here under review. *College Savings Bank*, 148 F.3d at 1351, Pet. App. at 111a. ("These cases miss the mark, however, because they ignore the essential fact that, because the Fourteenth Amendment was enacted subsequent to the Eleventh Amendment, unlike Article I, it expressly qualified the principle of sovereign immunity."). The Federal Circuit concluded:

> Our sister circuits wrongly equate the result afforded by Congressional power under the Fourteenth Amendment and Article I with the Constitutional structure under which Congress governs and the federal courts exercise jurisdiction. When the states adopted the Fourteenth Amendment, and consented to cede a portion of their authority to the federal government, it was within their contemplation that they limited their Eleventh Amendment immunity. *Fitzpatrick* teaches so, and we adhere to its reasoning. *See* 427 U.S. at 453-54.

Id.

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[8] In his dissent in *Chavez*, Judge Wisdom provides a compelling analysis of why the exercise of Congress' Section 5, Fourteenth Amendment power to protect property rights created by Congress pursuant to Article I is not inconsistent with this Court's overruling of *Union Gas*. *Chavez*, 157 F.3d. at 296-98. Judge Wisdom recognized that Congress can create property interests under its Article I powers and also can protect the property interests so created pursuant to its power under Section 5 of the Fourteenth Amendment. *Id.* at 296.

II. THE COURT OF APPEALS MISAPPLIED THE *PARDEN* DOCTRINE.

A. THE *PARDEN* DOCTRINE REMAINS VALID LAW AND SHOULD NOT BE OVERRULED.

The Court of Appeals correctly declined to affirm the district court's holding that this Court's decision in *Seminole Tribe* implicitly overruled *Parden*. *College Savings Bank*, 131 F.3d at 365, Pet. App. at 24a. ("[A] court of appeals should be reluctant to hold that the Supreme Court implicitly has overruled its own decision when the Court had an opportunity to overrule the decision explicitly and did not do so.").

More importantly, CSB contends that *Parden* should not be overruled because to do so would severely restrict the authority of Congress under Article I of the Constitution when states choose to leave a sphere that is exclusively their own and enter into the world of commerce. The *Parden* doctrine cannot be used to infringe upon the immunity provided to the states by the Eleventh Amendment, *so long as the states confine themselves to governmental functions*. Obviously, the purpose of the Eleventh Amendment was to protect the states from being subjected to suit in federal courts when functioning in their *governmental capacity*. There is no diminishment of the Eleventh Amendment by applying the *Parden* doctrine provided that Congress, with the requisite clarity, has made it clear that states will be deemed to have waived their immunity if they enter into commercial activities which, inevitably, compete with the private sector.

B. CONGRESS HAS STATED ITS INTENTIONS WITH THE CLARITY REQUIRED BY THIS COURT TO APPLY *PARDEN*.

The Court of Appeals found that in the case at bar all of the requirements for applying the *Parden* doctrine had been met, except for its finding that Florida Prepaid's activities were "an important or core government function." *College Savings Bank*, 131 F.3d at 363, Pet. App. at 21a. The Court of Appeals found "if a state or its instrumentality chooses to engage in proprietary activity that potentially falls under the Lanham Act, it can be held liable in federal court for violations of that Act." *Id.* The Court of Appeals also found that by the enactment of the TRCA, Congress intended that a state or instrumentality engaging in proprietary activity "that potentially falls under the Lanham Act" can be held liable in federal court for violations of that Act. *Id.* Thus, this Court's requirement that there be "an unequivocal expression that Congress intended to override Eleventh Amendment immunity" was met by the TRCA. *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 478 (1987). Further, the TRCA served to give the states clear notice that continuing to engage in the regulated activities would be deemed a waiver of sovereign immunity. Finally, Florida Prepaid has engaged in the activity covered by the federal legislation, *i.e.*, has engaged in allegedly unfair competition under Section 43(a) of the Lanham Act. *See College Savings Bank*, 131 F.3d at 363, Pet. App. at 21a.

There can be no doubt about the congressional intention, as the Court of Appeals correctly found. Congress' sole purpose in enacting the TRCA was to allow the states to be brought into federal court to answer for violations of the Lanham Act, including Section 43(a). Therefore, the *Employees* test, which focused exclusively on discerning a congressional intent to override the Eleventh Amendment, has clearly been met. *Employees of the Dep't of Pub. Health &*

Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973).

C. FLORIDA PREPAID'S ACTIVITIES ARE NOT BEYOND THE REACH OF *PARDEN*.

The Court of Appeals erred in finding that Florida Prepaid, by offering investment vehicles, was engaged in education as a core function of state government. The finding confuses "education" with financial investments used to meet the costs of college, clearly a private, not a governmental function.

Florida Prepaid, a "body corporate", Fla. Stat. § 240.551(5), J.A. 48, of the State of Florida, was created to manage the prepaid expense program with the power to engage in commercial transactions with the public and the power to sue and be sued in its own name. *Id.* § 240.551(5)(c)(2), J.A. at 49. Florida Prepaid's product is marketed outside of the State of Florida, and the proceeds of its program can be used for colleges outside of Florida. *Id.* § 240.551(7)(e), J.A. at 62-63. Florida Prepaid is authorized to collect administrative fees and penalties for delinquent payments. *Id.* § 240.554(5)(c)(13), J.A. at 50. Florida Prepaid controls the price of its contracts. As of June 1995, it had assets of almost $1.5 billion and a surplus of $184 million. *College Savings Bank*, 948 F. Supp. at 410, Pet. App. at 49a. Florida Prepaid's earnings cannot be used by the State of Florida. Fla. Stat. § 240.551(10), J.A. at 66-67.

Florida Prepaid described its program in its 1994 Annual Report as follows:

> Cooperative efforts of private enterprise and state government provide the daily operations

> of the Program. Only eight state employees oversee the Program's day-to-day objectives.[9]

The Annual Report also reveals that the program is carried out by "seven private companies," First Union National Bank of Florida, Ernst & Young, U.S. Trust, BTI Services, Inc., Coopers & Lybrand, The Hannah Group and North American Life Assurance Company. *Id.*

Florida Prepaid enjoys considerable autonomy, appointing its own executive director, and contracting with "private consultants, actuaries, managers, legal counsel, and auditors for administrative or technical assistance." *College Savings Bank*, 948 F. Supp. at 413, Pet. App. at 56a-57a. Florida Prepaid provides to its investors a return guaranteed to be sufficient to pay the future costs of college. *College Savings Bank*, 948 F. Supp. at 401-02, Pet. App. at 29a-30a.

In *Parden*, this Court found that Congress had the power to enact legislation governing conduct in areas not committed exclusively to the public domain and to deem a state to have constructively waived its Eleventh Amendment immunity if, after passage of the legislation, a state engaged in the regulated activity. *Parden*, 377 U.S. at 196 ("When a State leaves the sphere that is exclusively its own and enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."). Thus, when a state chooses to do business in an area which has been made subject to authorized federal legislation, it waives its immunity. Florida Prepaid has engaged in the selling of investment vehicles, an area where private persons normally run the enterprise. *Employees*, 411 U.S. at 284.

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[9] Florida Prepaid's 1994 Annual Report, attached as Exhibit B to Florida Prepaid's Answer, Affirmative, Defenses and Counterclaim.

Providing investment instruments to assist in meeting the cost of college is neither a sphere committed exclusively to the states nor a core governmental function, and is therefore within the scope of *Parden*. The Court of Appeals, however, concluded that the *Parden* test was changed by this Court's 1973 decision in *Employees*. The Court of Appeals interpreted *Employees* as modifying *Parden* by creating an "important government function exception to *Parden*." *College Savings Bank*, 131 F.3d at 362, Pet. App. at 19a. The Court of Appeals concluded "a state cannot be deemed to have waived its immunity if it is engaged in an important or core government function." *Id.*, at 131 F.3d 363, Pet. App. 19a.

Employees was decided prior to this Court's 1987 decision in *Welch*, in which this Court stated that the application of the *Parden* doctrine "required an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Welch*, 483 U.S. at 478. *Employees* was a forerunner of the *Welch* decision, relative to the needed clarity of the intention of Congress. In *Employees*, this Court concluded that "Congress desired to bring under the Act employees of hospitals and related institutions." *Employees*, 411 U.S. at 283. The significant finding by the Court, however, was that there was "not a word in the history of the 1966 Amendments to indicate a purpose of Congress to make it possible for the citizens of that State or another State to sue the State in the federal courts." *Id.* at 285. Because of the sweeping implications of concluding that Congress intended to impose a constructive waiver, the Court held that "we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum." *Id.*

In summary, *Employees* does not stand for the proposition that this Court has changed the basic test as set forth in *Parden*, *i.e.*, that the Congress has authority to impose

a constructive waiver "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation . . . ." *Parden*, 377 U.S. at 196 Rather, *Employees* is a forerunner of this Court's decision that Congress must clearly express its intent for the *Parden* doctrine to apply.

The Court of Appeals' discussion of the overall importance of education and the importance of education to the states is immaterial to the issue before this Court. *College Savings Bank*, 131 F.3d at 363-65, Pet. App. at 21a-24a. The Court of Appeals has confused the distinction between the role of the states in providing educational institutions with the quite different function of providing investment vehicles for assisting parents and others to meet the costs of college. That certainly is not a sphere of authority exclusive to the states, nor indeed, a core function of the states. *See Genentech, Inc. v. University of California*, 143 F.3d 1446, 1453 (Fed. Cir. 1998), *petition for cert. filed 11/3/98*, Dkt. No. 98-731, 67 U.S.L.W. 3337 (1998)("[T]he University's actions are not at the core of the educational/research purposes for which the University was chartered as an arm of the state . . . .") (footnote omitted).

The Court of Appeals' interpretation would deprive the *Parden* doctrine of meaning, since virtually any activity undertaken by a state could be interpreted as assisting some function deemed to be important to a state government. The Court of Appeals properly held that it would be improper for the Court to hold that the *Parden* doctrine has been overruled by implication. The Court of Appeals, however, by finding *Parden* inapplicable based upon a conclusion that education is an important state function, rather than analyzing the issue of the financing of college costs, has effectively overruled the *Parden* doctrine by application.

In sum, the Court of Appeals erred in finding that Florida Prepaid's offering of investment vehicles is beyond the reach of the *Parden* doctrine.

CONCLUSION

For the above reasons, the Court of Appeals' judgment should be reversed and the case remanded for further proceedings.

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